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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1928

SANITARY REFRIGERATOR COMPANY,
Petitioner,
vs.
ALEXANDER F. WINTERS,
AND
BASIL R. CRAMPTON,
Respondents.
No. 128.

ALEXANDER F. WINTERS,
AND
BASIL R. CRAMPTON,
Petitioners,
vs.
DENT HARDWARE COMPANY,
Respondent.
No. 14

CONSOLIDATED BRIEF FOR WINTERS AND CRAMPTON.

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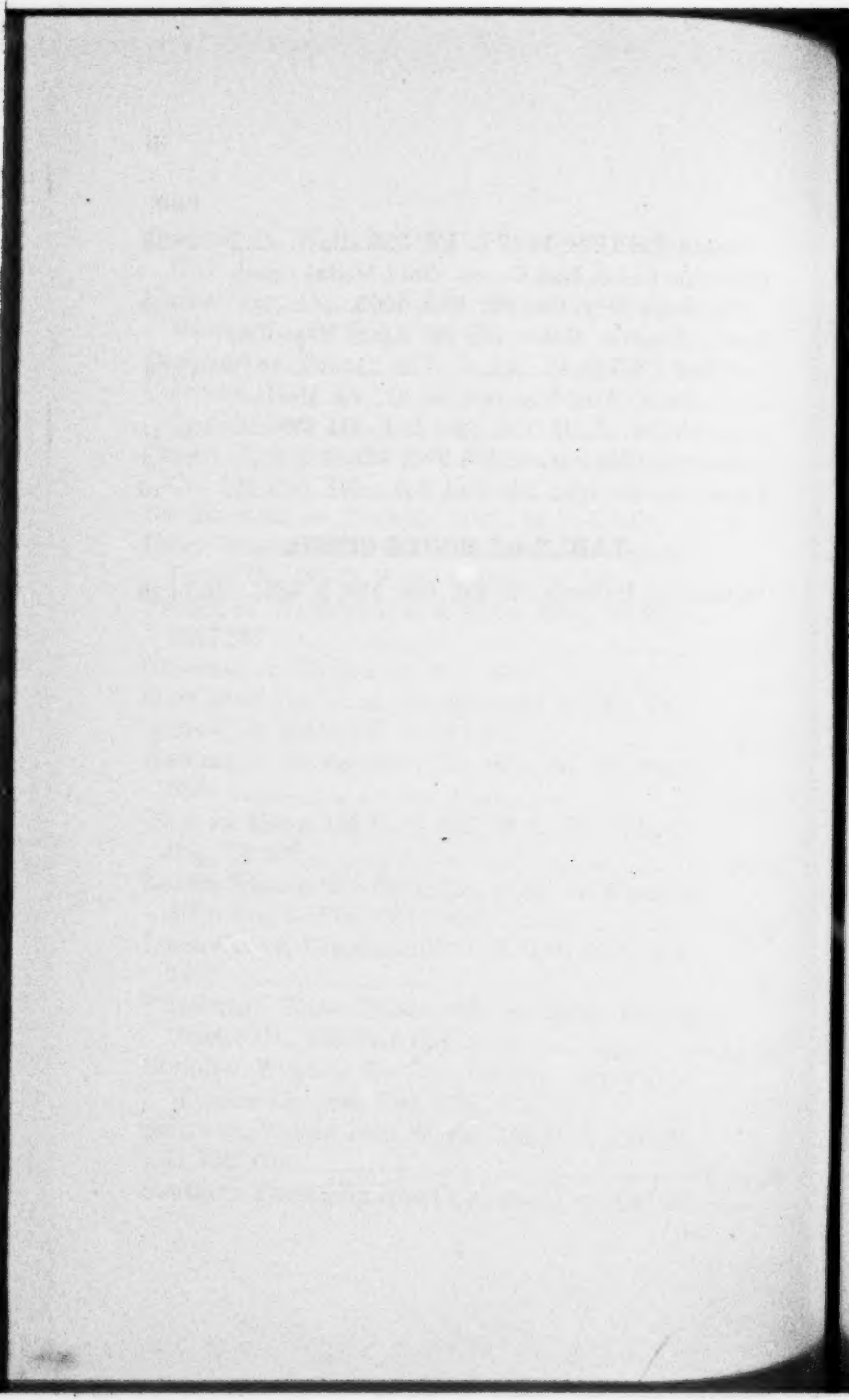
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} No. 128.

ALEXANDER F. WINTERS,
AND
BASIL R. CRAMPTON,
Petitioners,
vs.
DENT HARDWARE COMPANY,
Respondent.
} No. 547.

CONSOLIDATED BRIEF FOR WINTERS AND CRAMPTON.

I.

THE OPINIONS OF THE COURTS BELOW.

The two cases above identified are before the Supreme Court of the United States because of diversity of opinion and conflict in decision on the part of the Circuit Courts of Appeals for the Seventh and Third Circuits relative to the same subject-matter.

The conflict in opinion is solely respecting the matter of infringement of certain claims, having numbers 1, 2, 3, 4 and 7, of United States Letters Patent 1,385,102, issued to Winters and Crampton on the 19th day of July, 1921, for a Latch. Both Circuit Courts of Appeals and the District Courts which heard the cases in the first instance are united in holding the claims of the patent in question valid.

The opinion of the Court of Appeals for the Seventh Circuit is reported in 24 Fed. (2d), page 15. A rehearing was denied March 6, 1928. The said claims of the patent in question were held valid and infringed.

The opinion of the Court of Appeals for the Third Circuit is reported in 28 Fed. (2d) 583, and is printed in the advance sheets of the Federal Reporter under date of December 6, 1928. It was decided October 4th, 1928, and a rehearing denied October 31, 1928. The claims 1, 2, 3, 4 and 7, of the Winters and Crampton patent in this case were held valid but not infringed. The charged infringing structure in both cases was the same, the Dent Hardware Company selling its latches to the Sanitary Refrigerator Company.

II.

STATEMENT OF THE CASE.

The Latch of Patent No. 1,385,102.

In referring to the two cases, for convenience the first, No. 128, will be termed the Sanitary Case and the second, No. 547, the Dent Case.

The patent No. 1,385,102 is in the Sanitary record, pages 69 to 73, and in the Dent record, pages 103 to 109. Five of the claims numbered 1, 2, 3, 4 and 7 (Dent R.,

pp. 108, 109) are involved in the present case. The latch, which is the subject-matter of patent 1,385,102 and disclosed in the drawings (Dent R., pp. 104, 106) includes two parts, namely, a keeper structure permanently secured to the door jamb 2 of a refrigerator and a pivotally mounted latch lever structure permanently secured to the front face of the door 1 adjacent its free vertical edge. The keeper has a flat base 14 permanently attached to the door jamb, an outwardly projected post 16 and a substantially triangular shaped head 17 having two outer cam edges or sides 18 and 19, the former at the upper outer side of the head and the latter at the lower outer side. The head depends below the post 16 whereby a hook is formed open at its under side, the head 17 having a rear inclined edge 20 inclined upwardly and inwardly toward the door jamb from its lower end, this being the part of the keeper against which one arm of the latch lever engages when the door is closed.

The pivoted lever construction includes a supporting fixture having a flat base 3 permanently secured to the door, an outwardly extending post 5 and an overhanging arm 6 spaced from and parallel to the base and to the plane of the front side of the door.

Between the base and overhanging arm 6 a latch lever 7 is mounted for a swinging movement in a vertical plane parallel to the front of the door. The lever is pivoted between its ends on a pivot pin 8. At one side of the pivot the lever is formed into an operating lever 11. At the other side the lever provides a keeper engaging arm 9, hereafter referred to as the *first* or *keeper engaging* arm. There is also a *second* arm 12 on the lever which projects laterally substantially at right angles therefrom from the handle side of the pivot.

The lever is limited in movement to a substantially 90° swing. When the door is open the lever may occupy a horizontal position, in which case the handle side of the lever engages against the upper side of the post 5 to maintain the lever horizontal. Equally well the lever may occupy a vertical position (as in Fig. 4, Dent R., p. 106) in which case a side of the first arm engages against the opposite side of the post 5 of the fixture permanently secured to the door 1.

The opposite sides of the post furnish stops, indicated at 5*a* (Dent R., p. 106, Fig. 4), which limit the swing of the lever in opposite directions and control its movements so that it must occupy either a vertical or horizontal position, yet may equally well occupy either position, and have a free swinging movement between the two positions through an arc of substantially 90°.

Should the lever be in its horizontal position when the door is open, moving the door to closed position brings the first arm 9 against the cam edge 19 (Dent R., p. 106, Fig. 6) of the keeper head and the inner cam side 10 of the arm 9 rides against the edge 19 of the keeper head thereby automatically throwing the lever toward vertical position (as in Fig. 6, Dent R., 106). This movement continues until the inner side of the second arm 12 strikes against the upper edge 18 of the head. Then upward swinging movement is rapid under the momentum of a relatively heavy refrigerator door, and when the second arm 12 strikes against the upper edge 18 of the head, the swinging movement of the lever is reversed and the lever thrown back with considerable speed, bringing the first arm 9 under the hook of the keeper and automatically wedging it against the inclined inner edge 20 of the keeper head.

This is described in lines 37 to 54, inclusive (Dent R., 108), as follows:

> "If the lever has dropped to horizontal position while the door is open the closure of the door and engagement of the lever with the keeper is accomplished by merely swinging the door shut, in which case, as shown in Figs. 6 and 7, the arm 9 strikes with its inclined cam side 10 against the lower curved side 19 of the head 17 of the keeper, causing the handle to be automatically turned to the vertical position. This movement continues until the arm 9 passes by the lower point of the keeper head 17, or, as usually occurs, the arm 12 comes into contact with the head at the upper side 18, whereupon the lever is actuated to bring the arm 9 under the depending portion of the keeper, the same as before described when closing the door with the lever in vertical position."

The lever may be and usually is in a vertical position when the door is open and the patent in an earlier part of its description describes the action, if the lever is vertical, beginning with line 16 (Dent R., 108) and ending with line 26, as follows:

> "When the door is moved toward closing position with the lever vertically located, the cam side 13 of arm 12 strikes against the curved upper side 18 of head 17, causing the lever to be automatically swung toward the horizontal, and bringing the arm 9 into place so as to pass under the lower point of the keeper head so that it may engage at its outer side against the wedging cam side 20 of the head."

In either case, whether the lever be in vertical or horizontal position, when the door is closed, merely swing-

ing the door to closed position causes the automatic wedging engagement of the first or keeper engaging arm 9 of the lever with the keeper. Such wedging engagement is effected by the rapid swinging movement given to the lever whereby the keeper engaging first arm 9 automatically wedges tightly against the inner inclined side 20 of the keeper head.

To open the door the handle 11 is grasped and swung to the upper position, as in Fig. 4 (Dent R., 106). When it is thus swung, should the door stick, as sometimes occurs because of swelling, the arm 12 rides upon the upper edge 18 of the keeper head 17 and pries the door open, the lever usually staying in its upper vertical position. It, however, is a free swinging lever and may fall to horizontal position either accidentally or because it is brushed by the clothing of one using the refrigerator to such position. Irrespective of the position of the latch lever, closing the door automatically effects a secure and tight latching and without detriment to the latch, the door or the door jamb of the refrigerator.

The Dent Latch.

The latch used by the Sanitary Refrigerator Company, manufactured and sold to it by the Dent Hardware Company, which the Court of Appeals for the Seventh Circuit held was an infringement of the Winters and Crampton patent, and the Court of Appeals for the Third Circuit held was not an infringement, is in substantial accordance with the disclosure of a certain patent to Schrader, No. 1,575,647, issued March 9, 1926, several years subsequent to the Winters and Crampton patent. This Schrader patent is shown in the Dent Record, pp. 146, 149.

Such latch, likewise, has a keeper structure permanently secured to a refrigerator door jamb and a pivoted swinging latch structure permanently secured to a refrigerator door adjacent its free vertical edge. The keeper (Fig. 3, Dent R., 146) has a flat base b1, an outwardly extending post terminating in a depending hook head, the outer edge of which, indicated at b5, is a cam edge exactly like the under outer cam edge 19 of the head of the patent in suit. Said hook head at its inner edge is also inclinded upwardly, as indicated at b4, corresponding to the inner inclined edge 20 of the patent in suit. The keeper head at the side thereof adjacent the door has a laterally projecting pin b8 with a cam side b9.

The pivoted swinging lever structure structure (Dent R. 146, Fig. 8) includes a base c3 permanently secured to the front side of the refrigerator door (as in Fig. 2), an outwardly extending post and an overhanging arm c4 spaced from and parallel to the base and front face of the door. The latch lever is pivotally mounted between its ends on a pivot pin c2, lying between the base and overhanging arm. At one side of the pivot the lever is formed into an operating handle c5 and at the other side into a *keeper engaging* or *first* arm c7. Extending laterally from the lever at the handle side of the pivot is a cam c1, shown as of arcuate form in the drawings of the Schrader patent.

The actual latch used by the Sanitary Refrigerator Company, manufactured for it by the Dent Hardware Company, as shown in the exhibits filed before the Third and Seventh Circuit Courts of Appeals, is slightly different in design from that shown in the Schrader patent. The cam illustrated at c1 in the Schrader patent is modified so as to be a substantially

straight inclined or oblique cam and not curved or arcuate as shown, while the design of the head of the keeper in the physical embodiments of the Dent latches sold to the Sanitary Refrigerator Company is a complete copying of the design of the Winters and Crampton keeper, having both the upper and lower curved outer edges to the keeper head the same as Winters and Crampton used, the only difference being that a lug or pin corresponding to the pin b8 (Fig. 3, Dent R., 146) projects laterally from the head of the keeper. The action of the latch, however, is not materially changed in any respect by these slight differences in design.

The latch lever in the latch used by the Sanitary Refrigerator Company, furnished it by Dent Hardware Company, has a free swinging movement in a plane parallel to the face of the refrigerator door, is stopped when the handle engages against the upper side of the outstanding post of the fixture on which the lever is mounted, or when in horizontal position; and is stopped when swung in the other direction by the keeper engaging arm, c7, coming against the opposite or underside of the same post. The lever freely swings through an arc of substantially 90° between its vertical and horizontal positions and may equally well occupy either position, and is quite as liable to occupy one position as the other when the door is open.

With the Dent latch, used by the Sanitary Refrigerator Company, if the latch lever should be in a horizontal position when the door is open, on closing the door the inner side of the first or keeper engaging arm c7 is brought against the lower outer edge b5 of the keeper head, automatically throwing the lever upward to the vertical position or until the inclined cam c1 strikes the pin b8, whereupon the movement of the

lever is reversed and it is swung back with considerable speed and momentum to bring the keeper engaging first arm c7 into operative wedging engagement with the inner inclined side b4 of the keeper hoop; exactly as with the Winters and Crampton latch in every respect.

If, on the other hand, the latch lever is in vertical position, closing the door brings the inclined cam c1 against the cam side b9 of pin b8 and the lever is quickly and rapidly swung in a clockwise direction to bring the keeper engaging first arm into tight wedging engagement with the keeper hook; the same as with the Winters and Crampton latch when the arm 12 (Dent R., 106, Fig. 4) engages against the inclined cam edge 18 of the keeper head as the door is being closed.

Exhibits of the latch in suit, owned by Winters and Crampton, and of the latch used by the Sanitary Refrigerator Company, manufactured for it by Dent Hardware Company, are before the court. Plaintiff's Exhibit 2, in the Sanitary suit is a mounted latch device built exactly in accordance with the disclosure of patent No. 1,385,102 in suit. Plaintiff's Exhibit No. 3, in the Sanitary suit, is a mounted latch used by Sanitary Refrigerator Company, sold to it by Dent Hardware Company. Like exhibits of mounted latches were before the Court of Appeals for the Third Circuit.

The Invention of the Patent in Suit.

Refrigerator latches have long been manufactured and used. The art entered by Winters and Crampton was an old and crowded art. Many latches, as will appear later, have been manufactured wherein an automatic tight latching of a refrigerator door upon its

closing was secured by means of spring-actuated latch levers having a spring to act on the lever to wedge it into engagement with a keeper. Pivoted latch levers of the drop handle type, that is, those which were pivoted on the door at their upper ends and depended from the pivot have been used to engage with a keeper mounted on the door jamb but such levers, in the absence of springs, necessarily had to be pushed upon by the operator in order to have a secure and tight closure of the door. Other latches had been used of the swinging lever type, swinging in a plane parallel to the face of the refrigerator, but all such latches had previously been mounted on the door jamb and swung across the meeting edges of the door and door jamb when the door was closed; and if the lever should drop to a horizontal position with the door open, the handle portion of the lever extended into the path of movement of the door so that the door could not be closed and any attempt to close the door by swinging it shut resulted in injury to either the latch or door or door jamb, usually all three occurring.

The Winters and Crampton patent in suit, No. 1,385,102 (Dent R., 107), refers to the last named type of swinging lever latch, beginning with line 9 of the description and ending with line 45, as follows:

> "This invention relates to a latch of the swing lever type, particularly adapted for use on refrigerators, though applicable in many other relations where a door is to be closed and held in closed position. The swinging lever latch, or as it is better known, the Condit latch, is pivotally connected at one end to the door jamb or casing, allowing the door to be opened when the latch is thrown to the upper vertical position, and coming down across the meeting

edges of the casing and door when swung to horizontal position, engaging with a cam member on the door to wedge the door tightly shut. This latch is a very serviceable latch but is relatively hard to operate due to its attachment to the casing instead of the door and the same is liable to drop to horizontal position, in which case the door cannot be closed without first lifting the lever to upper vertical position while, many times, the door is inadvertently swung to the closed position and against the lever in its horizontal position with injury either to the lever, or door, or both. In the present invention, it is a primary object and purpose to provide a latch which may be pivotally connected to the door and which is automatically operated to engage with a retaining member or keeper fixed on the door casing when the door is closed irrespective of the vertical or horizontal position of the lever, working as well in one case as the other."

The so-called Condit lever referred to in this extract from the description of the patent in suit, is in evidence as an exhibit, Plaintiff's Exhibit J, offered in the Dent case (Dent R., 80). The automatic Condit latch may be observed in the patent to Schrader, No. 1,114,296 (Dent R., 128), wherein it will be observed that if the door was open and the lever was in the dotted line position, shown in Fig. 1, it would stand in the way of closing the door due to the mounting of this lever on the door jamb.

The essential and salient features of the Winters and Crampton patent in suit and the practical and useful result which was to be obtained therefrom was that a swinging latch lever, analogous to the swinging lever of the Condit type shown in plaintiff's Exhibit J in the Dent suit and in the Schrader automatic Condit latch just referred to, could be mounted on the refrigerator

and when mounted, irrespective of its vertical or horizontal position, in either of which positions it was likely to be, when the door is closed the latch lever automatically engages with the keeper with a tight wedging engagement and with no liability or injury either to the latch, or door, which was very liable to occur with latches of the Condit type if the lever should inadvertently or otherwise be in a horizontal position and extend into the path of movement of the refrigerator door.

The patentees, Winters and Crampton, in the patent in suit attained this object and purpose by their construction which has been described and which is fully illustrated and specifically described as to structures and operation in their patent (Dent R., 104 *et seq.*). And in such structure of latch, if the lever is vertically positioned when the door is closed, a very rapid swinging impulse to the lever is given it in a clockwise direction, causing an automatic wedging engagement of the keeper engaging arm with the keeper; while if the lever is in a horizontal position on closing the door it is thrown upwardly in a counter-clockwise direction, there occurring an engagement of the second arm of the lever with the keeper at the upward limit of travel of the lever, and then a very rapid counter-clockwise movement of the lever which again caused an automatic wedging engagement of the keeper engaging first arm with the keeper.

This cooperation of the parts described results in making the latch a springless automatic latch, one which serves at all times to securely and tightly close and wedge the door closed, and one in which no care has to be had to see that the lever occupies a particular position prior to the closing movement of the door.

And it was this arrangement and combination and invention in a latch, on the part of Winters and Crampton, which, it is submitted, the Dent Hardware Company manufactured and the Sanitary Refrigerator Company used, mounting the same kind of lever on the door in the same place and utilizing the same type of keeper to cooperate therewith and mounted on the door jamb in the same place as did Winters and Crampton; and getting identically the same movements caused by the same cooperation of parts, working in the same manner to attain the same results of automatically wedging the door closed when it was moved to closed position irrespective of the vertical or horizontal positions of the latch lever.

III.

SPECIFICATION OF ERRORS.

The specification of errors on the part of the petitioners, Winters and Crampton, in the Dent suit is as follows:

1. The opinion is erroneous in holding that claims 1, 2, 3, 4 and 7 of Winters and Crampton patent (Rec., p. 104 et seq.) are not infringed by the device of latch structure manufactured and sold by the Dent Hardware Company made in substantial accordance with the disclosure of the Schrader patent, 1,575,647 (Rec., p. 146 et seq.).

2. The opinion is erroneous in finding that the differences in structure between the latch illustrated, described and claimed in the Winters and Crampton patent and in the latch structure manufactured by the Dent Hardware

Company in substantial accordance with said Schrader patent aforesaid, affect a different principle of operation, and that the earlier patents in the latch art require a construction of said claims 1, 2, 3, 4 and 7 of the Winters and Crampton patent such that the Dent Hardware Company does not infringe.

3. The opinion is erroneous in not finding that such differences in construction as appear are differences in form only without change of function, operation or modus operandi and involve merely a reversal in parts of the kind which, in the sense of the patent law, does not change in the least the identity which the respondent's latch structure has with the patent in suit. And therefore, the court erred in not finding infringement even under the most restricted and limited construction which the claims of the patent in suit could have where the identity in the sense of the patent law is complete and absolute.

4. The court erred in not finding that the questions of validity and infringement had been finally and conclusively determined, as between the parties, by the Court of Appeals for the Seventh Circuit involving the same patent, the same charged infringing structure and the same parties in the sense that the Dent Hardware Company was privy to the Sanitary Refrigerator Company and is concluded by the final and conclusive judgment rendered against the Sanitary Refrigerator Company by the Seventh Circuit Court of Appeals upon the questions of validity and infringement, of which judgment of the Seventh Circuit Court of Appeals the Circuit Court of Appeals for the Third Circuit had knowledge, and which it directly referred to in its opinion.

IV.

ARGUMENT.

Summary of Argument.

Point A. The failure of the Third Circuit Court of Appeals to give effect to the prior decision and judgment of the Seventh Circuit Court of Appeals, constitues error where there is the requisite identity of the subject-matter and privity between the parties as here established. The prior judgment of the Seventh Circuit Court of Appeals upon the questions of validity and infringement, which questions were the same in all respects in both suits, is final and conclusive, notwithstanding the appeal to the Seventh Circuit Court of Appeals was interlocutory and notwithstanding the judgment which finally and conclusively determined the questions of validity and infringement also referred the matter back to the District Court for an accounting.

Hart Steel Co. et al. vs. Railroad Supply Co., 244 U. S. 294; 61 L. Ed. 1148;

Smith vs. Vulcan Iron Wks., 165 U. S. 524; 41 L. Ed. 810;

Southern Pacific Railroad Company et al. vs. United States, 168 U. S. 1; 42 L. Ed. 355;

Bissell Carpet Sweeper Co. vs. Goshen Sweeper Co., 72 Fed. 545;

Larkin Automotive Parts Co. et al. vs. Bassick Mfg. Co., 19 Fed. (2d) 944;

Carson Inv. Co. et al. vs. Anaconda Copper Mining Co., 26 Fed. (2d) 651.

Point B. There is complete and absolute identity of the latch structure manufactured by the Dent Hardware Company and used by the Sanitary Refrigerator

Company with that disclosed in patent 1,385,102 in suit in the sense of the patent law. Such physical changes as appear are merely changes involving reversal or transposition of two parts or elements of a combination, all of the rest being physically identical, without change in function or principle of operation. There is identity in the patent law and infringement of the claims 1, 2, 3, 4 and 7 of patent 1,385,102 in suit no matter what the construction of said claims may be.

Union Paper Bag Mac. Co. et al. vs. Merrick Murphy et al., 97 U. S. 120; 24 L. Ed. 935;

Hoyt vs. Horn, 145 U. S. 302; 36 L. Ed. 713; 12 Sup. Ct. 922;

Delvin et al. vs. Paynter et al., 64 Fed. 398;

Anchor Cap & Closure Corp. vs. Prichard, 232 Fed. 156;

Crown Cork & Seal Co. vs. Aluminum Stopper Co., 108 Fed. 845;

Walker on Patents, 5th Ed., Sec. 348, Page 432;

Columbia Wire Co. vs. Kokomo Steel & Wire Co., 143 Fed. 116;

Walker vs. Kiles et al., 218 Fed. 637;

Simplex Window Co. vs. Hauser Reversible Window Co., 248 Fed. 919;

Telescope Cot & Bed Co. vs. Gold Medal Camp Furniture Mfg. Co., 229 Fed. 1002;

Pittsburgh Water Heater Co. vs. Beler Water Heater Co., 228 Fed. 674.

Point C. The improvement in latches defined in the claims 1, 2, 3, 4 and 7 of patent 1,385,102, is meritorious as evidenced by its immediate acceptance, large sales and substantial supplanting and superseding of other springless pivoted lever refrigerator latches. It was

an important and meritorious improvement in the refrigerator latch art. Whether a pioneer or an improvement patent, a meritorious patent is entitled to liberal treatment and to the application of the rule "*ut res magis valeat quam pereat,*" and a forbidding of the appropriation thereof by an infringer which copies the entire substance of the invention.

Eibel Process Co. vs. Minnesota & Ontario Paper Co., 261 U. S. 45; 43 Sup. Ct. 322;

Temco Electric Motor Co. vs. Apco Mfg. Co., 48 Sup. Ct. Rep. 170.

Point D. The prior patents and earlier constructions considered by the Courts of Appeals for the Third and the Seventh Circuits do not have the invention of the patent in suit and do not necessitate any such narrow and destructive construction of claims 1, 2, 3, 4 and 7 of said patent 1,385,102 as held by the Circuit Court of Appeals for the Third Circuit where all of said claims have been held valid, are of different scope and are not limited by reason of failure to claim the invention, and there has been no abandonment of any part of the invention because of failure to claim the same; and particularly do not necessitate a construction of said claims 1, 2, 3, 4 and 7 of said patent in suit whereby the invention is limited to a degree permitting the Dent Hardware Company and the Sanitary Refrigerator Company to appropriate all the advantages of the invention through a formal alteration of structure involving a mere reversal of one stationary and one fixed part without changing in any way the principle or mode of operation with a complete appropriation of the invention of Winters and Crampton.

Point E. That the latch structure manufactured by Dent Hardware Company and used by Sanitary Re-

frigerator Company is made under a subsequent patent to Schrader No. 1,575,647 (Dent R., 146 *et seq.*) is immaterial to the question of infringement. One who obtains a later patent cannot appropriate and infringe an earlier dominating patent of another without license.

Hoyt vs. Horne, *Supra;*

Temco Electric Motor Co. vs. Apco Mfg. Co., *Supra;*

Cochrane vs. Deener, 94 U. S. 780; 24 L. Ed. 139;

Cantrell vs. Wallick, 117 U. S. 689; 29 L. Ed. 1017;

Herman vs. Youngstown Car Mfg. Co. (C. C. A. 6th), 191 Fed. 579;

Yancey vs. Enright, C. C. A. 230 Fed. 641;

French vs. Buckeye Iron & Brass Wks., (C. C. A. 6th); 10 Fed. (2d) 257.

Point A.

Res Judicata or Estoppel by Judgment.

The principles upon which the doctrine of *res judicata* is founded are well settled. The subject-matter in the suits must be the same, the parties must be the same, that is, identical, or properly related by privity. The judgment in the earlier case must be final and conclusive of the facts and issues which are set up as *res judicata* in the later case. In the event that the party in the first case is not formally and on the record the party in the second case against whom *res judicata* is urged, such party in the second case must have been so concerned in the first case, to the knowledge of the opposing party, that said party in the second case

asked to be concluded by the judgment in the first case, shall, in effect, be the same as the party in the first case against whom the judgment was rendered.

In the present situation there is no question as to the identity of the matters involved in the two cases before the Seventh and Third Circuit Courts of Appeals. The same patent, No. 1,385,102; the same claims to the patent, numbers 1, 2, 3, 4 and 7; and the same structure charged infringed, appear in both cases without change in any respect.

There is no question as to the privity existing between the Dent Hardware Company and Sanitary Refrigerator Company and that such privity was known to the plaintiffs, Winters and Crampton.

It is charged in the Bill of Complaint in the Dent suit (Dent R., 7). The Vice-President of the Dent Hardware Company admitted that it, in effect, substituted itself for the Sanitary Refrigerator Company in the case tried in the Seventh Circuit. In the Dent Record, p. 20, appears the following:

> "Harry C. Dent, of Allendale, Pennsylvania, is a manufacturer of refrigerator hardware. He had heard of the suit brought by Winters and Crampton on patent 1,385,102 against the Sanitary Refrigerator Company of Fond du Lac, Wisconsin. The Dent Hardware Company undertook the defense of the suit; paid the bills, hired counsel and directed the furtherance of the appeal to the Court of Appeals in the Seventh Circuit."

In the next paragraph under "Defendant's Evidence" Harry C. Dent states that he is the Vice-President of the Dent Hardware Company, connected therewith about sixteen years as assistant sales manager

and also is in intimate touch with the manufacturing end.

The judgment that was rendered by the Seventh Circuit Court of Appeals on February 9th, 1928, rehearing denied March 6, 1928, 24 Fed. (2d) 15, finally and conclusively determined the questions of validity and infringement of claims 1, 2, 3, 4 and 7 of patent No. 1,385,102 as against the Sanitary Refrigerator Company and its privy, Dent Hardware Company.

The only disputable question, it would seem, relates to the matter of whether or not the decision and judgment of the Court of Appeals for the Seventh Circuit was "final" with respect to the questions of validity and infringement. The appeal to the Court of Appeals for the Seventh Circuit Court of Appeals was an interlocutory appeal as the accounting had not been determined. The Court of Appeals for the Seventh Circuit, however, had to pass upon the questions of validity and infringement of the claims of the patent and it is submitted that, notwithstanding the appeal was an interlocutory one, the judgment and order that was entered was final and conclusive respecting the questions of validity and infringement of the patent.

In support of this position reference is made to the Supreme Court case, Smith vs. Vulcan Iron Wks, *supra*. Before the time of this case nearly all of the Circuit Courts of Appeal had held that in a patent case, where an interlocutory appeal was had to consider validity and infringement questions, and not the accounting, the decision of the Court of Appeals, whether for or against the patent, is final and conclusive as to its validity and infringement. The Supreme Court in said case of Smith vs. Vulcan Iron Works on p. 812, 41 L. Ed., referred specifically to a case of the Sixth Circuit

Court of Appeals, namely, Bissell Carpet Sweeper Co. vs. Goshen Sweeper Company, *supra*, wherein Judge Lurton, later a Justice of the Supreme Court, with the concurrence of Judge Taft, now Chief Justice of the Supreme Court, and Judge Hammond, reversed an earlier decision which held to the contrary, bringing the practice into conformity with the other Courts of Appeal and establishing, that in a case of this kind, although the appeal is interlocutory, the questions of validity and infringement which are decided are finally and conclusively decided and are not subject thereafter to reconsideration and change.

In the Bissell Carpet Sweeper Case, on page 552 of Vol. 72, Fed. Rep., the Court of Appeals for the Sixth Circuit said:

> "It seems to us that the opinions and decrees of this, as a court of appellate jurisdiction, are final and conclusive upon every point actually decided, and that it is the clear duty of the lower court to give effect to the decree without modification or enlargement, in the very terms of the decree here rendered."

In the same case, on p. 548, 72 Fed., a reference was made to the Supreme Court case of Sanford Fork & Tool Co., 16 Sup. Ct. Rep. 291, wherein the Supreme Court said:

> "When a case has once been decided by this Court on appeal and remanded to the Circuit Court, whatever was done before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate."

The Supreme Court, in what is believed to be its latest pronouncement upon the matter of *res judicata* concerning a patent case, in Hart Steel Co. vs. Railroad Supply Co., *supra*, on p. 1153 of 61 L. Ed. stated as follows:

> "The doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and private peace,' which should be cordially regarded and enforced by the courts to the end that rights once established by a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect."

It is not contended in any manner that the judgment and order entered by the Seventh Circuit Court of Appeals on the 9th day of February, 1928, Sanitary R., 141 and 142) was a final disposition of all the issues of the Sanitary suit, inasmuch as an accounting was still pending. But it was a final order and judgment with respect to the questions of validity and infringement involved in the case, binding upon the Sanitary Refrigerator Company and its privy, Dent Hardware Company; and as such was conclusive upon the Sanitary Refrigerator Company and/or Dent Hardware Company in any later matter involving the same questions of validity and infringement. In other words, it is submitted, that following the pronouncement of the Supreme Court in Hart Steel Co. vs. Railroad Supply Co., *supra*, the doctrine of *res judicata* or estoppel by prior judgment, was not to be looked upon in any harsh or technical manner, but was to be cordially regarded and, therefore, it should not await a final

decree disposing of all of the issues in a suit but any decree, whether called interlocutory or final, which did finally and conclusively dispose of the issues with respect to which *res adjudicata* is asked, was sufficient for an application of the doctrine *res judicata* or estoppel by judgment.

Two, at least, of the Circuit Courts of Appeals have so regarded the matter. The Seventh Circuit Court of Appeals in Larkin Automotive Parts Co. vs. Bassick Mfg. Co., *supra*, on pages 944 and 945 of 19 Fed. (2d) after referring to the Supreme Court case of Hart Steel vs. Railroad Supply Co., said:

> "Final, as used by the courts when dealing with the subject of res adjudicata, is not to be determined, by adjective terms. If the decree, in fact, finally determines the issues presented by the pleadings and settles the controversies of the subject matter involved, it is sufficiently final to determine other litigation between the same parties, respecting the same issues, regardless of the fact that it may be in legal nomenclature termed an interlocutory degree.
>
> "The Larkin Automotive Parts Company cannot further contest the validity of the claims involved in this patent in the Ohio litigation. We conclude, therefore, that for the purposes of applying the doctrine of res adjudicata the decree of the Circuit Court of Appeals (6th C. C. A.) is a final decree so far as it determines the validity and infringement of claims 1, 2, 3 and 6 of Gullborg patent 1,307,744."

Likewise the Circuit Court of Appeals for the Ninth Circuit in Carson Inv. Co. vs. Anaconda Copper Mining Co., *supra*, considered identically the same situation, and on page 655 of 26 Fed. (2d) after referring

to a previous interlocutory decree which was entered the accounting on which was still pending, said:

> "Under the facts stated, at once the question arises whether the decision and decree of this court in the American Smelting & Refining Co. case as to the validity and construction of the patents is res adjudicata, not alone as to the defendants of record to that suit, but is an estoppel as to those in privity with the defendant therein.
>
> "It is very clear that the decree of this court in the American Smelting & Refining case in its essence and substance was final as to the validity of the patents involved, and as to the fact that there had been infringement. The questions of novelty and infringement were the pivotal ones before the court. They were considered and conclusively disposed of by our decree; thence they were finally settled."

The Court of Appeals for the Ninth Circuit in this case held, that the final determination of questions of validity and infringement of a patent in an interlocutory appeal, and one in which after the interlocutory appeal the accounting was still pending, was nevertheless a final determination of the questions of validity and infringement which would conclude the losing party, or those in privity with it, from raising the questions of validity and infringement in another case by the same plaintiff, basing it on the rule of law that, there being no further review before the Circuit Court of Appeals of these questions after once determined, any subsequent review being only of proceedings subsequent to the interlocutory decree, the judgment and order of the Circuit Court of Appeals respecting validity and infringement of a patent was as final and

conclusive as it ever would be, and fully as final and conclusive as it would be when a final decree was entered disposing of all the issues of a patent case, including the accounting.

It is submitted that any contention that, in a patent case, a final decree disposing of all issues in the case must first be entered before *res judicata* will apply, and which was so decided by Judge Ray in Australian Knitting Co. vs. Gormly, 138 Fed. 92, is erroneous as based upon a supertechnical ground and one which is contrary to the spirit of the Hart Steel Co. case; and since the time of the Hart Steel Co. case, as evidenced by the two cases, one of the Seventh Circuit Court of appeals and the other of the Ninth Circuit Court of Appeals, discussed, regard has been had for substance rather than technicality, and a finding of a Circuit Court of Appeals relative to the questions of validity and infringement on a interlocutory appeal have been considered final and conclusive respecting those questions, inasmuch as they are not thereafter subject to review on any later appeal which involves the accounting.

It is, therefore, contended on behalf of Winters and Crampton, that the judgment rendered and entered by the Court of Appeals for the Seventh Circuit on February 9, 1928, of which the Third Circuit Court of Appeals had immediate information, which it knew of and recognized and expressly discussed in the opinion handed down by it (Dent R., 208 *et seq.*), should have been held by the Third Circuit Court of Appeals as conclusive against the Dent Hardware Company because of the final and and conclusive determination of exactly the same questions by the earlier judgment of the Court of Appeals for the Seventh Circuit. It is submitted that this prior judgment, though entered

after an interlocutory degree, is as final and conclusive respecting the questions involved as though it was a judgment entered at the eventual determination of the entire case. The questions of validity and infringement of patent 1.385,102 were questions directly put in issue and directly determined by the Court of Appeals for the Seventh Circuit which had jurisdiction thereof. They were finally and conclusively determined by the Court of Appeals for the Seventh Circuit and it is submitted that these findings, "cannot be disputed in a subsequent suit by the parties or their privies."

This last quotation is from the Southern Pacific Railroad Company vs. United States, *supra*. In this case on page 377 of 42 L. Ed. the Supreme Court said:

> "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

The finality of the decision and judgment of the Circuit Court of Appeals in a patent case as to the questions of validity and infringement directly put in issue before it on an interlocutory appeal from a District Court of the United States is conclusively settled in the case of Smith vs. Vulcan Iron Wks., *supra*, the judgment of the Circuit Court of Appeals, following such

interlocutory appeal, on the questions of validity and infringement of the patent being final and conclusive and thereafter unassailable before such court or any subordinate court. There is no ground, either in law or equity, for making the effect of such final and conclusive judgment await until some unrelated question, such as damages or profits in a subsequent accounting, is determined. The only basis for such a ground would be a technical stand that a final decree in the entire patent suit must be entered before *res judicata* as to the questions of validity and infringement conclusively and finally settled earlier can apply. The Supreme Court in the Hart Steel Company case, it is submitted, has ruled that the doctrine of *res judicata* should not be hampered by any such technical considerations but should be cordially regarded and enforced. The Seventh and Ninth Circuit Courts of Appeals have construed this pronouncement of the Supreme Court to mean that in a situation like the present one, the judgment of a Circuit Court of Appeals on an interlocutory decree with respect to the questions of validity and infringement of a patent is final as to such questions, and is a proper basis for concluding and estopping the losing party or its privies from questioning such conclusion at a later time. Therefore, it is submitted, that in the present case the final and conclusive judgment, though handed down on an interlocutory appeal, rendered and entered by the Circuit Court of Appeals for the Seventh Circuit on February 9, 1928, of which the Court of Appeals for the Third Circuit had knowledge long before October 4th, 1928, when it handed down its opinion, was conclusive as to validity and infringement when urged against the Dent Hardware Company, the party who sold the

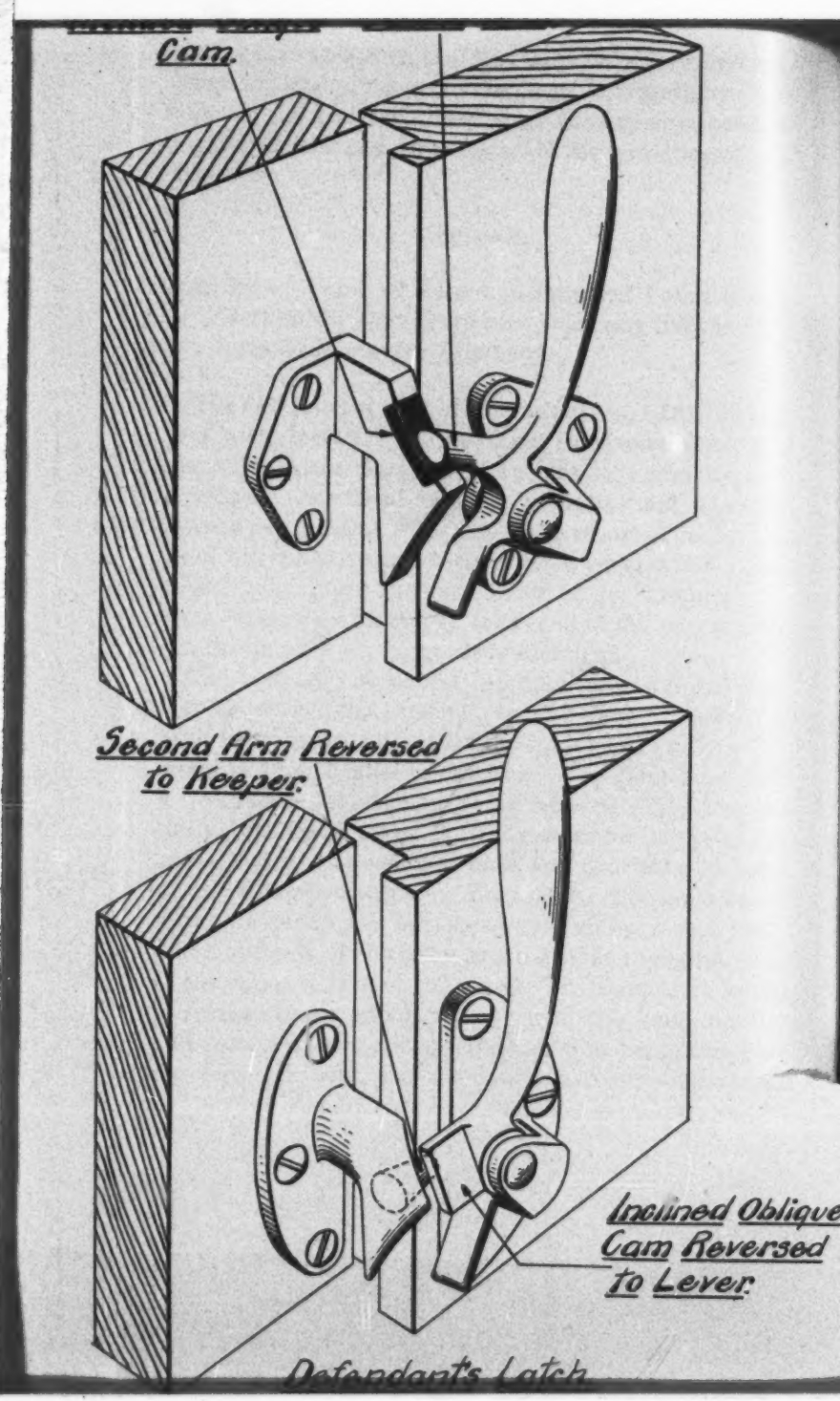
infringing latches to the Sanitary Refrigerator Company and was privy to the Sanitary Refrigerator Company in the first suit, bearing all the expense, employing the counsel and directing all of the activities of said first suit.

Point B.

Identity of Latch of Patent in Suit and Latch Manufactured by Dent Hardware Company Sold to Sanitary Refrigerator Company.

The two latches, that of the patent No. 1,385,102 and that manufactured by the Dent Hardware Company and sold to the Sanitary Refrigerator Company, are physically indentical in most respects, and where a change in physical form has been resorted to by the Dent Company it has been a mere reversal of parts without change in function, mode of operation, or results attained, whereby, in the sense of the patent law, the two latches are completely identical.

The latch of the patent in suit uses a fixture, previously described, attached to the door including a base, an outwardly extending post and a laterally overhanging arm parallel to the base. The Dent latch has a like fixture identical in every respect. The latch of the patent has a lever pivotally mounted between its ends located between said base and overhanging arm of said fixture. So has the Dent latch. The latch lever of the patent in suit is formed with an operating handle at one side of the pivot and a keeper engaging arm at the opposite side of the pivot. The Dent latch lever is formed in the same manner with the same handle and with the same oppositely extending keeper engaging arm. In both, the lever swings freely through a


Cam.
Second Arm Reversed to Keeper.
Inclined Oblique Cam Reversed to Lever.
Defendant's Latch

90° arc in a plane parallel to the front of the door. Both are stopped when the handle portion of the lever engages against the upper side of the post of the door fixture holding the lever horizontal. Both are stopped in a vertical position by the keeper engaging arm striking against the opposite side of the post of said fixture.

The keepers in the patent in suit and in the Dent latch each have a base, an outwardly extending post and a substantially triangular shaped depending head forming a hook for the keeper engaging arm. The lower outer edge of the keeper head in both is a curved cam against which the keeper engaging arm of the keeper strikes when the door is moved to a closed position with the lever horizontal. The physical identity so far is exact and unchanged in any respect.

The latch lever of the patent in suit has a second arm projecting laterally therefrom and the keeper has a cam to co-operate therewith at the upper outer edge of the keeper head. In the Dent latch, a pin projects laterally from the side of the head toward the latch lever and an inclined cam to cooperate therewith projects laterally from the side of the lever.

There has been a transfer and reversal of the second arm of the lever of the patent in suit to the keeper and a transfer and reversal of the inclined cam cooperating therewith from the keeper to the lever, in the Dent latch.

The accompanying drawing has been made to illustrate what has just been described. The latch of the patent in suit appears at the upper part under the heading, "Plaintiffs' Latch." In the plaintiffs' latch, a second arm is noted projecting laterally from the latch lever and the inclined cam at the upper outer edge of the head of the keeper is shown in solid black.

In defendant's latch, shown in the lower part of the drawing, the inclined cam has been reversed or transferred to the lever, and the second arm has been reversed or transposed to the keeper.

This, it is submitted, is the merest alteration and reversal of parts that can be done and when attempted it is to be held an infringement under the principles of Union Paper Bag Co. vs. Merrick Murphy, *supra*. The patent in the Union Paper Bag Co. case was concerned with a paper bag making machine. Paper bag making machines were very old, or as the decision of the Supreme Court therein says, on page 935 of 24 L. Ed.:

> "Machines for making paper bags are old, as both sides admit; and the evidence in this case shows that they have been constructed by many persons and in various forms for more than twenty years, and with more or less utility. Neither party, in this case, claims to be the original and first inventor of an entire machine of the kind; nor could such a claim, if made, be sustained, in view of the admitted state of the art."

The matter in issue in the Union Paper Bag Machine Co. case related to the mechanism for cutting the paper. In the patent the cutter was movable, was lifted vertically and descended by its own weight. The paper passed over a stationary striker and when the cutter dropped by its weight the paper was cut. In the charged infringed machine a knife identical in shape with that of the patent was stationary over which the paper passed, and a weight in the form of a bar of metal was lifted and then thrown down sharply upon the paper, causing the knife to cut the paper as effectively as did the cutter in the machine of the patent.

That is, a knife and a striker were used in both machines. In the patent the striker was stationary, the paper passed over it and the knife dropped against the striker with the paper between. In the infringing machine the knife was stationary, the paper passed over it and the striker came against the knife with the paper between, a reversal in position and movement of the knife and striker but with an attainment of like results in both cases. There was relative movement of the knife and striker in both instances, though in one case, that of the patent, the striker was stationary and the knife movable, while in the infringing machine the knife was stationary and the striker movable. The Supreme Court found that these two machines were identical in the sense of the patent law, holding, on page 936 of 24 L. Ed. that:

> "Except where form is of the essence of the invention, it has but little weight in the decision of such an issue, the correct rule being that, in determining the question of infringement, the court or jury as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find that one thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result; * * *."

From the strictly physical standpoint in the present case, in patent No. 1,385,102, the second arm (marked 12, Dent R., 104, 106) is on the lever and moves with it. The cooperating inclined or oblique cam 18 is on the keeper head and stationary. In the Dent latch the sec-

ond arm is on the keeper head and is stationary, as shown by the pin b8 in the drawing of the Schrader patent 1,575,647 (Dent R., 146, Fig. 3). The cooperating came c1 is on the lever and movable with it. The pin b8 and the cam c1 on the latch lever work together, cooperating together, serve exactly the same functions, no more and no less than the arm 12 and the cam portion 18 of the structure of the patent in suit shown Dent R., 104, 106. There has been the same kind of alteration in form of the latch of the patent in suit by the Dent company in this case as was done by the infringer in the Union Paper Bag Machine Company case; and in the sense of the patent law they are the same thing, doing the same work in the same way and accomplishing the same results, no more and no less.

The cooperation of the second arm 12 on the lever of the patent in suit (Dent R., 106) and the upper outer cam portion 18 of the keeper head takes place in opening the door and also in closing the door. In opening the door the inner side of such second arm rides on the outer surface of the cam 18, prying the door open if for any reason it is tight or sticks, as many times happens with refrigerators due to swelling because of moisture. This action occurs on swinging the latch lever upwardly about its pivot in a counter clockwise direction to bring the arm 12 and cam 18 against each other . With the Dent latch the inner side of the inclined oblique cam c1 which has been transferred to the lever (Dent R., 146), on a like movement of the lever in a counter clockwise direction, rides against the outer side of the pin b8 on the keeper head, causing the door to be opened even though it should stick, by reason of the cooperating cam action by the cam c1 on the lever and the lug or pin b8 on the keeper in exactly

the same way and with exactly the same pivotal movement imparted to the lever.

In closing the door with the latch structure of the patent in suit, if the lever is in vertical position, the inner side of the second arm strikes and rides against the cam edge 18 of the keeper head with an automatic turning of the lever in a clockwise direction into engagement with the keeper hook. With the Dent latch under such circumstances, the inner side of the inclined oblique cam c1 rides against the upper outer side of the pin b8 with a like automatic clockwise turning movement of the lever into engagement with the hook of the keeper.

If the latch lever in the patent in suit is horizontally positioned when the door is closed the keeper engaging arm rides against the under outer cam edge 19 of the keeper head, turning the lever upwardly about its pivot until the second arm 12 strikes against the upper cam edge 19 of the keeper, causing a reversal of movement of the lever, following which it swings the first or the keeper engaging arm into automatic wedging engagement with the inner side of the keeper head. With the Dent latch if the lever is horizontally positioned on closing the door, the first or keeper engaging arm c7 rides against the lower cam edge b5 of the keeper head swinging the lever upwardly until the inclined cam c1 strikes the pin b8, whereupon the lever is reversed in its movement and moved rapidly in a clockwise direction, and the first or keeper engaging arm wedges against the inner side b4 of the keeper head.

There is identity in operation in every respect caused by identical engagements of like parts in the two latches in every movement that the latch lever

makes, either in opening or closing the door. There has been no change in function, there has been no new combination made by this mere reversal and transposition of one stationary and one movable part, which in their reversed positions cooperate in the same way and have the same relative movements with respect to each other. This is a kind of change in the relative positions of the parts of a machine meant in the first sentence of the first paragraph of section 348 of Walker on Patents, Fifth Edition, page 432, where the change in relative position in no way effects the respective functions of the parts which have been changed, or as said by Walker:

> "Change in the relative position of the parts of a machine or manufacture does not avert infringement, where the parts transposed perform the same respective functions after the change as before."

It is not a change like that referred in the second paragraph of section 348 of Walker, where the change has so changed the functions of the parts that the machine is a new machine with a substantially different mode of operation.

The Dent latch presents no new change in function or mode of operation and the only thing that can be said, which was urged before both the Third and Seventh Circuit Courts of Appeals, namely, that the location of the inclined oblique cam on the latch used by the petitioner is closer to the pivot of the lever than is the second arm of the latch of the patent, while the lug or reversed second arm on the keeper head is located inward from the outer upper edge of said head, thereby making a closer coupling of the two cooperat-

ing parts (the second arm and the inclined arms), works only a slight change in the leverage, making only a slight difference in the degree of force which may be secured in opening a door that sticks, though the way that the door is pried open remains exactly the same.

This exact equivalence and, therefore, identity in the sense of the patent law is set forth first in this brief for the reason that it may obviate the necessity for any further consideration of the case. The claims 1, 2, 3, 4 and 7 are valid. Both trial courts and appeal courts have found them so. If there is this complete identity in the sense of the patent law as set forth by the Supreme Court case cited, it is immaterial whether the construction of the claims be broad, narrow or otherwise, for no matter how narrow a construction or interpretation be given, complete identity of a charged infringing structure with the patented structure in the sense of the patent law necessarily proves infringement of even the narrowest claim that a patent may have, or of any claim under the narrowest construction and interpretation that is given to it. One of the lower courts, that of the Southern District of New York, in Anchor Cap & Closure Corp. vs. Prichard, *supra*, by Judge Learned Hand, now judge of the Circuit Court of Appeals for the Second District, on page 160 of 232 Fed. in treating patent No. 874,201, discussed the structure of the defendant's machine therein, called attention to the reversal of parts of the machine of the patent in suit, called attention to the prior art, and concluded:

> "It is quite possible that the scope of the patent must be held strictly to the disclosure itself; but that question is academic here for the defendant has copied the machine faithfully ex-

cept for the *mere reversal of the parts.*" (Italics ours.)

In Crown Cork & Seal Co. vs. Aluminum Stopper Co., *supra,* on page 866 of 108 Fed., the Circuit Court of Appeals for the Fourth Circuit said:

> "The court will look through the disguises, however ingenious, to see whether the inventive idea of the patentee has been appropriated, and whether the defendant's device contains the material features of the patent in suit, and will declare infringement even when those features have been supplemented and modified to such an extent that the defendant may be entitled to a patent for the improvement." Citing Clough vs. Gilbert & Barker Mfg. Co., 106 U. S. 164, 27 L. Ed. 134; and same, 106 U. S. 178, 27 L. Ed. 138.)

Section 348, p. 432, Walker on Patents, 5th Ed., says:

> "Changing the relative positions of the parts of a machine or manufacture does not avert infringement, where the parts transposed perform the same respective functions after the change as before." (Citing ten supporting cases.)

In Columbia Wire Co. vs. Kokomo Steel & Wire Co., 143 Fed., on page 122, the Court of Appeals for the Seventh Circuit said:

> "We are of the opinion that the means thus transposed in the appellee's machine, if not within the definition of colorable evasion which infringe the patent in any view of its scope, are plain appropriations of the essence of the Bates conception by equivalent means, and infringe-

ments of the patents within the well settled rule referred to. All the elements of the patent combination are employed with substantial identity in their use, and departure appears from the letter of the claims only in the arrangement of these elements, without substantial difference in the principle of operation. The policy and rules of the Patent Law require that the patentee be protected against such evasion of a wording of the claim in form or non-essential details when the substance of the invention is thus used and is unmistakably shown in the specification and claims." (Citing six supporting cases of the Supreme Court and one by a Circuit Court of Appeals.)

In Walker vs. Giles, et al., 218 Fed., on page 638, the Court of Appeals for the Second Circuit said:

> "The only change of organizations which defendant has made is the placing of the flange, which acts to hold the hub in place, on the gear rack instead of on the hub. In one case the flange rests on the teeth of the gear rack; in the other the teeth of the hub rest on the flange. This is a mere reversal of parts, and under well settled principles will not avoid infringement."

In Simplex Window Co. vs. Hauser Reversible Window Co., 248 Fed., on page 926, the Circuit Court of Appeals for the Ninth Circuit said:

> "It is apparent, from a comparison of the two devices, that they both produce the same result. The real question is: Do they do so by substantially the same means? It is needless to cite the numerous cases in support of the law clearly stated in section 348, Walker on Patents, the substance of which is that changing the relative

> position of the parts of a machine does not avert infringement, where the parts transformed perform the same respective functions after the change as before, but that such change does do so where the changing of those positions so changes the functions of the parts that the machine acquires a substantially different mode of operation, even though the ultimate result remains the same."

In Telescope Cot & Bed Co. vs. Gold Medal Camp Furniture Mfg. Co., 229 Fed., the Court of Appeals for the Second Circuit, on page 1004, said:

> "Infringement seems too clear for discussion. In the Herman cot the slots are in the braces and the pins are on the brackets connected to the legs. In defendant's cot the slots are in the brackets and the pins are on the braces. It is wholly immaterial on which parts of the combination the slots and pins are respectively located so long as they function alike in both structures; this they do because defendant's slots in the brackets are so located that the play of the pins therein is in the same direction as the length of the braces. The amount of this longitudinal play is slightly less in defendant's structure because the slots are somewhat shorter, but they are long enough to secure a substantial longitudinal play. Infringement may be found although the infringing device does not obtain the advantages of the invention to the fullest extent."

In Pittsburgh Water Heater Co. vs. Beler Water Heater Co., 228 Fed., the Court of Appeals for the Third Circuit, on page 677, said:

> "That mere departure or reversal in order and form, while identity or principle, process

> or result are retained, will not serve to avoid infringement, is a fundamental principle of patent law that needs no supporting citations."

In Devlin vs. Paynter, et al., 64 Fed. 398 (3rd C. C. A.), the Second Syllabus says:

> "A union for steam pipes, consisting of a head member having a seat of soft metal with a concave face, and a tail member having a convex face, is infringed by a union which differs only in the facts that the convex face is on the head member and the concave face is on the tail member, and that the soft metal is on the convex face instead of on the concave face."

The various cases cited of the Circuit Courts of Appeals are decisions of courts of final resort in patent matters and beyond which, as soon as the establishment of Circuit Court of Appeals took place, a patent case seldom went. Changes in relative position of parts, without departure from the invention and the principle of operation thereof, which do not break up the combination and make a new combination with a greater or less number of elements in the combination than are defined in the claims of a patent which is charged infringed, and particularly where there is a mere reversal of two cooperating parts in a combination structure, does not avoid infringement and has been universally so held by all courts of last resort. The principle of law is stated by the Third Circuit Court of Appeals as so well settled as to require no supporting citation.

Most rearrangements and reorganizations of elements which make a new invention, in fact, it is believed all of such reorganizations and rearrangements

which really make a new combination are reorganizations and rearrangements which go far beyond merely reversing two cooperating parts, one of which is stationary in the device of the patent and the other of which is movable, while in the charged infringing device the previous stationary part has been made movable and the previous movable part stationary. Mere reversal, of this kind, has always been, it is submitted, considered identity in the sense of the patent law irrespective of how strict a construction is given to the claims of a patent. For the question of the breadth of scope of the patent become merely academic, as Judge Hand has said, where there has been a faithful copying of the patented mechanism except for such mere reversal; because, in fact, in such cases, in the sense of the patent law, there is absolute and complete identity which will bring the infringing article within the scope of any valid claim of the patent whatever its construction may be.

Point C.

Patent No. 1,385,102 Meritorious and Entitled to Liberal Treatment.

The automatic swinging lever latch structure disclosed in patent No. 1,385,102 in suit is one of merit, as evidenced by its immediate wide acceptance, large sales to refrigerator manufacturers and its supplanting and superseding other pivoted springless latches previously used on refrigerators, making the same practically obsolete. Mr. Crampton, one of the inventors (Dent R., 35, 36; Sanitary R., 10), stated that the latch was sold to a great number of refrigerator companies and that 90 per cent of the commercial refrigerators, that, is, large refrigerators used in butcher

shops, grocery stores and the like, had this type of latch and were using it. Approximately 400,000 of the latches were sold in the preceding year. Plaintiffs' Exhibit H (Dent R., 117) is a compilation of latches made in accordance with this patent in suit from the time it was marketed in 1921 to and including 1926, there being a total of over 2,000,000 of the latches of this character sold.

The latch is particularly useful in its larger sizes on commercial refrigerators, but is also sold to household refrigerator companies.

Where a construction, like the latch of the patent in suit, coming into a very crowded art and one in which latches for refrigerators have been used for many years, is immediately accepted, sold in large quantities and must have taken the places of the latches previously used on the 90 per cent of the commercial refrigerators, supplanting and superseding them and rendering the latches formerly used for years practically obsolete, it is very weighty evidence of an invention of exceptional merit; and it is submitted is one which is entitled to a liberal treatment and the claims entitled to a construction which will, if possible, give effect to the patent rather than desroy it. The patent does not have to be a pioneer, nor one making a long step in advance in an art, in order to be entitled to liberal treatment, if, in fact, the invention which has been made is meritorious.

The Supreme Court has recently so stated in Eibel Process Co. vs. Minnesota & Ontario Paper Co., *supra,* as follows, on p. 328, 43 Supt. Ct. Rep.:

> "In administering the patent law, the court first looks into the art, to find what the real merit of the alleged discovery or invention is,

and whether it has advanced the art substantially. If it has done so, then the court is liberal in its construction of the patent, to secure to the inventor the reward he deserves. If what he has done works only a slight step forward, and that which he says is a discovery is on the border line between mere mechanical change and real invention, then his patent, if sustained, will be given a narrow scope, and infringement will be found only in approximate copies of the new device. It is this differing attitude of the courts toward genuine discoveries and slight improvements that reconciles the sometimes apparently conflicting instances of construing specifications and the finding of equivalents in alleged infringements. In the case before us, for the reasons we have already reviewed, we think that Eibel made a very useful discovery, which has substantially advanced the art. His was not a pioneer patent, creating a new art; but a patent which is only an improvement on an old machine may be very meritorious, and entitled to liberal treatment. Indeed, when one notes the crude working of machines of famous pioneer inventions and discoveries, and compares them with the modern machines and processes exemplifying the principle of the pioneer discovery, one hesitates in the division of credit between the original inventor and the improvers, and certainly finds no reason to withhold from the really meritorious improver, the application of the rule 'ut res magis valeat quam pereat,' which has been sustained in so many cases in this court. Winans vs. Denmead, 15 How. 338, 341, 14 L. Ed. 777; Corning vs. Burden, 15 How. 265, 269, 14 L. Ed. 683; Turrill vs. Railroad Co., 1 Wall. 491, 510, 17 L. Ed. 668; Rubber Co. vs. Goodyear, 9 Wall. 788, 795, 19 L. Ed. 566; McClain vs. Ortmayer, 141 U. S. 419, 425, 12 Sup. Ct. 76, 35 L. Ed. 800."

The Supreme Court very recently, in Temco Electric Motor Co. vs. Apco Mfg. Co., *supra*, dealing with a patent which was not a pioneer, was affected in its decision by the way in which the public eagerly took to the device of the patent involved and its marked success. On page 172 of 48 Sup. Ct. Rep. it is said:

> "The District Judge in Ohio. in the K-W Ignition case was affected in his decision, that the Thompson patent involved invention, by the way in which the public eagerly took it and its marked success, and so, indeed, was the Circuit Court of Appeals for the Sixth Circuit. So are we."

Where, as in the present case, an invention is of the kind which obsoletes other structures which have been practically used for many years and which previously have been the best of their kind, it is submitted it is entitled to every consideration because of the weighty evidence showing that it is a real and marked advance, and a valid invention and that it is entitled to as liberal a treatment as many first inventions in a field.

In the present case Winters and Crampton made practically obsolete the so-called Condit lever, previously described in the first paragraph (Dent R., 107) of the patent in suit. The Condit latch of the swinging lever type, on the market when the Winters and Crampton latch was produced, is before the Court in the so-called Defendant's Exhibit 1914 Latch, made in accordance with the Schrader patent (Dent R., 128) No. 1,114,296. Such type of Condit latch is open for all latch manufacturers to make. As before stated, its principal objection, and which the latch made by Winters and Crampton overcame, is that when it drops to

horizontal position with the door open it extends partly across the door opening.

If Winters and Crampton had made no meritorious advance, there would be no necessity of infringement with the many other old latches available and free for use. It is submitted that it does not come with very good grace from any infringer to claim there has been either no advance or at least one of infinitesimal character, that the latch of the patent is no better than those previously used, yet at the same time cling stubbornly to the new patented latch and not use the old. The Court of Appeals for the Eighth Circuit in Griswold vs. Harker, 62 Fed. 389, on page 393, has commented upon such circumstances as follows:

> "Actions often speak louder, and frequently more truthfully, than words. It is not impossible that the reason why the appellees are not using the old devices they plead is that the improvements described in this patent have made them useless and unmerchantable. If this is not so, they can abandon the improvements of Seldon and Griswold, and go back to the devices they plead."

Likewise in the present case the various prior art patents, which will be more specifically considered under the next point of argument, are available for the Dent Hardware Company to manufacture and sell, may be resorted to without fear of infringement and if they are as good and work upon substantially the same principle to obtain the same results as well as the latch structure invented by Winters and Crampton, the Dent Hardware Company has them available for use without question by anyone.

Point D.

Claims 1, 2, 3, 4 and 7 of Patent 1,385,102 Define the Invention Completely and Prior Art Patents Do Not Anticipate or Destructively Limit the Invention Thus Defined.

A reference to the claims of the patent in suit, and which are printed in the Dent Record 108 and 109, shows that claims 1 and 2 are claims of the least breadth and define the invention the most specifically. The keeper is defined specifically. The fixture or member on which the lever is mounted is defined specifically in its three elements, "a base, an integral outstanding post projecting from the base and a laterally extending arm at the upper end of the post paralleling the base." The latch lever in its specific form is defined.

Even in this specific form, as defined in these two claims, it is submitted there is infringement for the reason that, while the latch made by the Dent Company has some variations in structure from that illustrated in the patent, such variations arise by reason of mere reversing or transposing two of the parts, one on the keeper and one on the lever, to the lever and keeper, respectively; and these parts when transposed or reversed retain exactly the same mode of operation and cooperate exactly the same way as they do in the specific form of latch structure illustrated in the Winters and Crampton patent drawings. There is physical and literal identity other than this mere transposition or reversal, and the identity with the patented structure, as defined by claims 1 and 2, of the charged infringing structure is present in the sense of the patent law.

The next most specific claim is claim 7. The keeper is defined as attached to the casing. The latch lever is defined as pivotally mounted on the door between its ends. One end of the lever is to be formed into an operating handle and the other into a keeper engaging arm. A second arm projects from the handle portion of the lever a short distance from the pivot at an angle to the first arm. A keeper is defined as formed at its outer sides for engagement with the respective arms when the lever is in horizontal and vertical positions, respectively, as the door is closed. This automatically operates the lever so that it will engage under the keeper when the door is closed no matter what the position of the lever.

This claim, as well as claims 1 and 2 previously noted, has the invention of the patent in suit and the same invention is present in the Dent latch. The Dent latch may be considered in either of two ways. The first, that the inclined oblique cam at the upper part of the keeper head has been transferred to the lever and the second arm of the lever transferred to the keeper head as before stated, which being a mere reversal disturbs in no way the cooperative action of the parts, or, second, the inclined oblique member on the lever of the Dent latch may be considered the second arm and the lug which projects from the keeper considered a part of the keeper, as the Seventh Circuit Court of Appeals did in its consideration of the matter. This appears from the opinion of the Seventh Circuit Court of Appeals (Sanitary R., 140, 141). The Court of Appeals for the Seventh Circuit (Sanitary R., 141) considered that the Dent lever had two arms, one, the first arm, to engage with the keeper when the door was closed, and to [illegible]age with the under curved cam at the outer side of [illegible]eeper head if the lever was horizon-

tal when the door was being closed; and a second arm, the inclined oblique member projecting laterally from the lever at the handle side of the pivot to engage with the lug on the keeper head, if the lever was in vertical position as the door was being closed, said lug being on and a part of the keeper head.

With the way that the Seventh Circuit Court of Appeals treated the Dent latch there is a literal correspondence of the terms of claim 7 to the Dent latch structure. The same is also true with respect to claim 1. And the only difference in literalism with respect to claim 2 is that in the first part of the claim the keeper is defined as including, "an outer head spaced from the casing and formed with upper and lower curved sides coming substantially to a point," and in the latter part of the claim, beginning with line 119 (Dent R., 8), "a second arm projecting from the handle portion at an angle to the first arm and adapted to ride against the upper outer side of the keeper * * *."

But even with respect to this part of claim 2, it is to be understood that in the Dent latch structure, that part of the keeper outwardly and beyond the upper side of the lug projecting from the keeper is surplusage and useless from a functional standpoint, as admitted by the Expert Witness for Dent (Dent R., 7, X-Q. 50 and answer) as follows:

> "X-Q. 50. In other words, that part of the fendant's keeper, above the lug, so far as function is concerned, is surplusage?
>
> A. That part of defendant's keeper which is above the lug, in the defendant's keeper, physical exhibit, is entirely unnecessary, and is, itself, merely ornamentation, and the same remarks apply in general to the drawings of the defendant's patent."

Therefore, the upper outer side of the lug being the upper outer side of the keeper when the unnecessary ornamental part is removed, there is literal correspondence to the terms of claim 2 on the theory that the lug is a part of the keeper head projected toward the lever because the second arm has been shortened somewhat, and the inclined oblique member projected laterally from the keeper is the second arm defined in the claims.

Whichever way of treating the matter is adopted there is infringement; direct literal correspondence to the terms of the claims 1, 2 and 7, and as will hereafter appear, 3 and 4 also, or identity in the sense of the patent law on the basis of a mere reversal of two parts of a combination structure, which reversal in no way disturbs or changes their cooperative action to obtain the results desired, which results are obtained by the same mode and principle of operation.

In the same way, with respect to claim 4 there is complete and direct appropriation of the invention defined therein. This claim defines a keeper attached to a casing, a latch lever pivotally connected to the door to engage with the keeper to hold the door closed, two arms on the latch lever, one of which is engaged with an outer portion of the keeper when the door is moved to closed position to swing the lever from horizontal to vertical position and engage the other arm under the keeper, the other arm being engaged with a different outer portion of the keeper when the door is moved to closed position with the lever horizontal to turn it upward to the vertical position, or until said other arm passes under and engages with the keeper to hold the door closed.

For, in the invention defined in this claim, literally

the Dent latch has the two arms, one in alignment with the handle, the other projecting laterally from the handle, and has a keeper, in which the lug is a part of the keeper head. The two arms engage with different outer sides of the keeper when the latch is in its two positions, one vertical and the other horizontal, to effect the engagement of one of the arms with the keeper when the door is closed. And from the standpoint of identity of the two latch structures, in the sense of the patent law, the reversal of the arm and the inclined cam part which cooperate with each other in plaintiff's patent is identity complete in every respect.

Claim 3 is the broadest of the claims. It defines a keeper attached to the case, a latch lever pivotally connected to the door and engageable with the keeper to hold the door closed, and means on the keeper and means on the latch lever to engage with the keeper on the outer sides thereof to swing the lever into engagement with the keeper at the inner side thereof when the door is closed, with the lever occupying either a horizontal or vertical position.

This claim clearly has no limitation restricting destructively in any manner the invention which was made by Winters and Crampton. This claim as well as claims 4 and 7 clearly does not limit the invention to any word picture of the drawing of the patent in suit. Like most patents which have any scope at all, there are several claims to the invention. The claims 1, 2, 3, 4 and 7 vary considerably in the terms used to define the invention. Claim 3 is of greatest breadth, claims 1 and 2 are the narrowest and claims 4 and 7 occupy an intermediate position. No abandonment by failure to claim the invention is present. There are

not any limitations in the claims which the Dent latch does not have either in the exact way as defined by the claims or in a direct equivalent that does not change the identity in view of the patent law. All of the elements defined in each of the claims 1, 2, 3, 4 and 7 are present in the Dent structure. None are omitted. No change in the cooperation of the elements is made. No change or variation in the principle or mode of operation is made.

The nearest prior art patent in the opinion of the Court of Appeals for the Third Circuit is that to Keil, No. 554,448 (Dent R., 124). It is pertinent to point out that in the progress of the Winters and Crampton patent application through the Patent Office this patent to Keil was cited, not against claims 1, 2, 3, 4 and 7, but against a claim which was drawn to the keeper *per se*. This appears Dent R. 168. Also in the same Office action other patents were cited by the Patent Office, such as Dent, No. 670,506 (Dent R., 120), and Ward, No. 1,250,736 (Dent R., 198).

The other patent which the Court of Appeals for the Third Circuit thought was of considerable weight, as appears from its opinion (Rent R., 212, 213) is that to Charles, No. 702,185 (Dent R., 152, 154). There are, in these several patents, pivoted latch levers, keepers and the like. The Court of Appeals for the Third Circuit says that Keil has the keeper *per se* and Charles has the lever *per se*, very nearly, in that it has two arms, one extending beyond the pivot or fulcrum of the lever, and the other substantially at right angles to it.

The opinion of the Court of Appeals for the Third Circuit is that Keil having the keeper and Charles having much the same lever, even though the second

arm of the Charles lever is on the wrong side of the pivot, and the Keil latch lever being mounted on the door and the Charles latch lever being on the door casing, the Charles lever can be put in place of the Keil lever and then by properly redesigning and changing the positions of the arms of the Charles lever the Winters and Crampton latch is made.

Granting that, after Winters and Crampton have shown how it could be done, this selection of various parts from the prior art may be accomplished and various changes in the Charles latch lever made, such method of attempting anticipation or destructive limitation of the claims of the Winters and Crampton patent is, it is submitted, completely and wholly unfair and unsound. For there is a complete ignoring of the combination entity produced by Winters and Crampton for the first time, as defined in their claims 1, 2, 3, 4 and 7 of the patent in suit, with attention given only to certain parts of the structure of the Winters and Crampton latch after it has been produced, with no thought or conception of organizing these various elements obtained from Keil and from Charles into a workable whole appearing previously in any of the prior patents. If such a method of defeating a patent had been permitted, the Webster patent in the case of Loom Company vs. Higgins, 105 U. S. 580; 26 L. Ed. 1177, would have been declared invalid by the Supreme Court of the United States instead of being held valid and a very valuable patent notwithstanding that all of the parts used in the Webster patent were old devices and well known.

A new combination is not defeated or emasculated by finding its several parts in different prior patents.

This principle, it is submitted, is so well settled as to be almost axiomatic.

With respect to the Keil patent, attention is called to the description of the operation thereof (Dent R., 125). This description begins with line 73, as follows:

> "In operation, when the door is pushed inward the pin 5 rides down the incline 9 of the keeper, as indicated in Fig. 4, and automatically lifts the handle end of the lever and finally assumes about the position shown in Fig. 3. A *downward* and *inward push* on said handle causes the pin 5 to ride up over the cam 10 to the position shown in Fig. 2, and thus firmly clamps the door in its casing. When the door is to be opened an outward pull of the handle first carries the parts back to a position where the pin 4 will engage the lower part of the substantially perpendicular face 9*a*, the pin 5 being at the same time carried down below the cam 10. Further movement in this direction carries the pin 4 up over and to a slight degree along the face 9*a*, and thus forces or 'pries' the door outward from its seat in a direct horizontal plane." (Italics ours.)

There is no thought or conception that this lever shall ever occupy a horizontal position. It is a freely swinging drop handle lever which has to be finally moved to closed position by hand exertion.

Likewise the Dent patent recites its operation (Dent R., 121), beginning with line 71. It is as follows:

> "The operation of the device is simple. When the door is pushed shut, the lever f is depressed to force the lug g into the seat g′ if the wing h′. When now the lever f is still further depressed, the cam f′ of the lever f is forced in-

ward by the weight h' of the keeper and by reason of the slotted connection with the pin or bolt e is permitted to bear directly upon the plate d of the door a. The door will thus be tightly jammed into its seat without strain upon the pivot e of the latch. When the door a is to be opened, the latch f is thrown upward until the lug g strikes upon the wing h2, when the door will be initially pried or forced open by the impingement of the lug g upon the said wing. By pulling upon the lever f the door will then come open easily and without any oblique pressure upon the door while in its seat."

The Charles patent, according to the opinion of the Third Circuit Court of Appeals (Dent R., 213), "has a handle portion which may stand in a horizontal, vertical or intermediate position." The Court of Appeals with respect to the Charles patent on this point is completely wrong. There are no stops of any kind and when the lever is free it hangs downwardly from its pivot, as shown in Fig. 3 (Dent R., 152) or in Fig. 5 (Dent R., 154). The other positions of the lever, shown in Figs. 6 and 7 are different positions of the lever as it is being swung across the meeting edge of the door and the door jamb from the position shown in Fig. 5 to that shown in Fig. 1; and if this lever was supplied with suitable stops to restrain it to a 90° swing between horizontal and vertical it would then be subject to the very objection of the Condit latch which was the primary object of Winters and Crampton to overcome. That is, referring to Fig. 1 of the Charles patent (Dent R., 152), if this lever was limited to swing from its horizontal position there shown through 90° to a vertical position its dropping to horizontal position with the door open would interpose the lever in the path of movement of the door.

It may also be further noted that the two so-called arms *d* and *e* of the Charles patent, neither of them ever have any engagement with the keeper *g* when the door is closed, while in the Winters and Crampton construction of latch the first arm 9, the keeper engaging arm, is to engage with the keeper when the door is closed. It is, therefore, submitted that the Court of Appeals for the Third Circuit erred completely when from such a showing of prior patents it held that the principle of the Winters and Crampton patent had been previously produced; that they were very doubtful about the validity of the claims, and that if valid they covered no more than a latch which was an exact physical reproduction of the specific details of the latch as disclosed in the drawings.

Various levers, cams, pins, arms, keepers of various sorts and the like are found in these different prior patents and prior structures. Such is usually the case in every patent of recent years at the present state of industrial development. But the mere prior production of various elements and the finding of the same in many different patents is not anticipation, nor controlling in determining and construing the claims of a patent to a combination where the combination is itself new for the first time and not anticipated.

The claims 1, 2, 3, 4 and 7 were allowed by the Patent Office as filed, and with the Keil and the Dent and the Ward patents before the Examiner, together with a description of the Condit latch and statement that it was old. The Charles swinging lever patent, in which the lever swings at a plane parallel to the face of the door, is defective because mounted on the door jamb and it is open to the same serious objection as the Condit latch. Changing the Charles lever from the jamb to the door is impossible.

This invention made by Winters and Crampton, it is submitted, was not obvious from all of these prior art patents. The Winters and Crampton patent was a very marked and wide improvement thereover. Upon its production it had to enter the market in competition with these earlier structures. If there was any doubt it should be completely dissipated, it is submitted, by the evidence of its success when offered for sale, its supplanting and superseding these others which are now brought against it as showing the invention, and its rendering the same practically obsolete. And the final evidence of the value of the Winters and Crampton invention is supplied by the Dent Hardware Company itself, which has copied it in all essentials, making an obvious change by a mere reversal of parts so far as the physical form of the latch is concerned, seeking to evade the patent which was granted to Winters and Crampton for their invention and obtain everything which was produced by Winters and Crampton, notwithstanding that it has all of these prior constructions available for it to use.

Point E.

Subsequent Patent to Dent Company Immaterial.

The latch used by the Sanitary Refrigerator Company is manufactured by the Dent Hardware Company of Fullerton, Pennsylvania. It claims some weight should be given to the issuance of the Schrader patent, No. 1,575,647 (Dent R., 146 *et seq.*), under which it claims to operate, in considering the question of infringement.

It is the position of Winters and Crampton herein that this issuance of a subsequent patent under which an infringer operates is immaterial to the question of infringement. There have been innumerable cases of the Supreme Court and of the Circuit Court of Appeals where the defendant appeared with a patent of its own under which it operated. In Temco Electric Motor Co. vs. Apco Mfg. Co. et al., *supra*, a very recent case, the Supreme Court, on page 173, 48 Sup. Ct., said:

> "It is well established that an improver cannot appropriate the basic patent of another and that the improver without a license is an infringer, and may be sued as such." (Citing a large number of cases settling this principle.)

It has been stated and restated by the Circuit Courts of Appeals. It is believed that the following by Judge Dennison from Herman vs. Youngstown Car Mfg. Co., 191 Fed. 579, on page 584 (6th C. C. A.) is a correct statement of the law showing that the later issue of a patent on the structure which is charged to infringe is completely and wholly immaterial to the question of infringement of an earlier patent:

> "Defendant's device is manufactured under patent No. 765,406, issued July 19, 1904, to J. H. Wagenhorst, and the court below gave to this fact some force in reaching his conclusion that the device did not infringe. We think that the granting of the later patent and defendant's conformity thereto are not of importance in this case on the infringement issue. There are expressions in some reported cases implying that by the later patent the government has granted a right to make and use the article so patented,

and that such grant is inconsistent with any construction of the earlier patent which would forbid the manufacture of the later structure. Such implication rests on a fundamental error. A patent is not the grant of a right to make or use or sell. It does not, directly or indirectly imply any such right. It grants only the right to exclude others. The supposition that a right to make is created by the patent grant is obviously inconsistent with the established distinctions between generic and specific patents, and with the well-known fact that a very considerable portion of the patents granted are in a field covered by a former relatively generic or basic patent, are tributary to such earlier patent, and cannot be practiced unless by license thereunder.

"Another reason sometimes advanced for supposing that the structure of the second does not infringe the claim of the first patent is that the Patent Office has declared that a patentable difference exists. The premise is sound, but not the conclusion. In examining the second application, the Patent Office has no concern with the scope of the claim of the first and does not and must not pay any attention thereto. It is concerned only with the early disclosure by the specification and drawings. Patentable difference does not of itself tend to negative infringement. It may just as well be based upon infringement, plus improvement; and improvement may lie in addition, simplification, or variance. This is well illustrated by this Wagenhorst patent. The drawings show, and the specifications describe a structure generally similar to Herman's, but each one of the 10 claims is found to be confined to some modification and supposed improvement added to the underlying combinations of the earlier art."

V.

CONCLUSION.

The latch manufactured by Dent Hardware Company and used by the Sanitary Refrigerator Company is identical, in the sense of the patent law, with that shown, described and claimed in patent No. 1,385,102 in suit. It has the same specific elements in combination. The first, or keeper engaging arm, on the latch lever and the under outer cam edge of the keeper head are physically the same, located in the same places in both latches, and cooperate in the same way for operating the latch lever when it is in horizontal position on closing the door. The second arm and the cam cooperating therewith are physically the same in both latches but have been transposed in position in the Dent latch. When the door is closed with the latch lever in its vertical position the transposed cam on the lever and the transposed second arm on the keeper in the Dent latch are brought together and cooperate to swing the lever about its pivot, exactly as the second arm on the lever and the inclined or oblique cam at the upper outer side of the keeper head cooperate in the patent in suit.

This change in form, without change in principle or mode of operation, in an attempt to evade a patent, retaining all of its advantages, yet trying to avoid the penalty of infringement, is exceedingly common on the part of infringers and has, it is submitted, been universally condemned by the Courts, which, in such cases, seek to penetrate the disguises attempted by the infringer and hold the infringer liable where it infringes in such manner.

Claims 1, 2, 3, 4 and 7 of patent 1,385,102, construed and interpreted in the light of the disclosure on which they are drafted, apply clearly and directly, in the sense of the patent law, to the construction of latch manufactured by the Dent Hardware Company and sold to the Sanitary Refrigerator Company in the same way that they apply to the disclosure on which they are drafted. Other than this mere change in form, involving no change whatever in the cooperation of the parts or elements of the structure, involving no change in principle or mode of operation, and attaining the same results throughout in the same way, there is no difference whatever in the latch of the patent in suit and the Dent latch charged to infringe.

Furthermore, the claims 1, 2, 3, 4 and 7 of the patent in suit read literally on the Dent latch structure, for the inclined oblique cam member projected laterally from the latch lever of the Dent latch is a second arm on the lever and the lug at the side of the head of the keeper is a part of the head of the keeper against the outer upper side of which the inclined oblique cam (Dent's second arm) engages for swinging the lever from its vertical position to keeper engaging position.

While in no sense a pioneer in the art of refrigerator latches, the latch of the patent in suit is a very meritorious construction, evidenced not only by its immediate acceptance and large sales when it entered a highly competitive field crowded with latches already in use, supplanting and superseding and rendering the same substantially obsolete, but it is also evidenced by the actions of the Dent Hardware Company, which had and which still has the other old springless pivoted latches available for use; like the Condit latch, the Dent latch of the Dent patent (Dent R., 120) which it

had previously been making; the Dent 1914 latch of the Schrader patent, No. 1,114,296 (Dent R., 129); the Keil latch, the patent on which has long since expired; or the Charles latch, on which the patent likewise has long since expired. Yet it has abandoned these latches, free for it to use, and manufactures the latch which is in controversy in this suit. It left the latches which were free and open for it to use to encroach on the Winters & Crampton patented latch with the inevitable litigation which resulted therefrom.

The Patent Office allowed the claims 1, 2, 3, 4 and 7 without change or amendment of any kind, with the Keil and Dent patents before the Examiner, and with a full description in the specification of the swinging lever Condit latch, admitted by the applicants to be old.

These circumstances, it is submitted, show conclusively that the structure of latch invented by Winters and Crampton was one of merit, proven to be of merit in all the ways in which merit proves itself in patented constructions, that it was novel and of particular utility and that it was an invention in accordance with all of the tests which can be applied to show the presence or absence of invention.

It is further submitted that infringement is clearly shown. Even under the most restricted construction which could be given to the claims, the infringement is evident because of the complete and absolute identity under the patent law of the Dent latch sold to Sanitary Refrigerator Company with the latch of the patent in suit, in which case the question of the scope of the claims becomes merely academic, as stated by Judge Hand, by reason of the faithful reproduction of the latch in suit by the Dent Company, except for the mere reversal in parts, many times noted in this brief.

And it is further submitted that the Dent Hardware Company was concluded by the judgment of the Seventh Circuit Court of Appeals, entered February 9th, 1928, of which the Court of Appeals for the Third Circuit had knowledge, evidenced by the recognition given in its opinion handed down October 4th, 1928.

Respectfully submitted,

ALEXANDER F. WINTERS AND
BASIL R. CRAMPTON.

By FRANK E. LIVERANCE, JR.,
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Counsel for Winters and Crampton.

Grand Rapids, Michigan,
December 21, 1928.